



State of New Hampshire
DEPARTMENT OF ENVIRONMENTAL SERVICES

6 Hazen Drive, P.O. Box 95, Concord, NH 03302-0095
(603) 271-3503 FAX (603) 271-2867



May 28, 2003

Herbert J. Furnee
Foxborough Pasture LLC
65 Aviation Drive
Gilford, NH 03249

COPY

Re: Administrative Order by Consent Docket No. WD 03-012

Dear Mr. Furnee:

Enclosed for your records is a copy of the Administrative Order by Consent in this matter executed by Harry T. Stewart, P.E., Water Division Director, and accepted by Acting Commissioner Robert Monaco on May 27, 2003. On behalf of the Department of Environmental Services, thank you for your cooperation in resolving these matters. If you have any questions, please contact me at (603) 271-6072, or by e-mail at msclafani@des.state.nh.us.

Sincerely,

COPY
Michael Scialfani,
Legal Assistant

cc: Harry T. Stewart, P.E., Director, Water Division
Mark R. Harbaugh, DES Legal Unit
Rene Pelletier, DES WLR
Mary Ann Tilton, DES WWT
Ana Ford, DES SIS
Public Information Officer, DES PIP
Gilford Conservation Commission
Gilford Planning Board
Gilford Code Enforcement Officer
Stephan T. Nix, Esq.
Cynthia Balcius, NH Soil Consultants, Inc.
Bryan Bailey, LLS, Turning Point Land Surveyors and Land Planners



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Herbert J. Furnee
65 Aviation Drive
Gilford, NH 03249

Foxborough Pasture LLC
65 Aviation Drive
Gilford, NH 03249

Re: DES Wetlands File 2002-2424
Belknap Mountain Road, Gilford

**ADMINISTRATIVE ORDER
BY CONSENT
No. WD 03-012**

A. INTRODUCTION

This Administrative Order by Consent is issued by the New Hampshire Department of Environmental Services, Water Division, to, and with the consent of, Herbert J. Furnee and Foxborough Pasture, LLC, pursuant to RSA 482-A:6 and RSA 485-A:17. This Administrative Order by Consent is effective upon signature by all parties.

B. PARTIES

1. The New Hampshire Department of Environmental Services, Water Division ("DES"), is a duly constituted administrative agency of the State of New Hampshire, having its principal office at 6 Hazen Drive, Concord, NH 03301.
2. Herbert J. Furnee is an individual having a mailing address of 65 Aviation Drive, Gilford, NH 03249.
3. Foxborough Pasture, LLC is a New Hampshire limited liability company, having a mailing address of 65 Aviation Drive, Gilford, NH 03249.

C. SUMMARY OF FACTS AND LAW SUPPORTING CLAIMS:

1. RSA 482-A authorizes DES to regulate dredging, filling, and construction in or on any bank, flat, marsh, wetland, or swamp in and adjacent to any waters of the state. Pursuant to RSA 482-A:11, I, the Commissioner of DES has adopted Wt 100 *et seq.* to implement this program.
2. RSA 482-A:3, I, states that "no person shall excavate, remove, fill, dredge or construct any structures in or on any bank, flat, marsh, or swamp in and adjacent to any waters of the state without a permit from [DES]."
3. RSA 482-A:14, III, provides that "failure, neglect or refusal to comply with [RSA 482-A] or rules adopted under [that] chapter, or an order or condition of a permit issued under [RSA 482-A], and the misrepresentation by any person of a material fact made in connection with any activities regulated or prohibited by [RSA 482-A] shall be deemed violations of RSA 482-A".

4. Pursuant to RSA 485-A:17, DES regulates significant alteration of terrain and erosion control through a permit program. Pursuant to RSA 485-A:6, VIII, DES has adopted NH Administrative Rules Env-Ws 415 to implement this program.
5. Mr. Furnee is the owner of the property located at Belknap Mountain Road in Gilford, NH, more specifically identified on Town of Gilford Tax Map 229 as Lot 58, and on Town of Gilford Tax Map 235 as Lot 3.2 (the "Furnee Property").
6. Foxborough Pasture LLC ("Foxborough") is the owner of the property located at Belknap Mountain Road in Gilford, NH, more specifically identified on Town of Gilford Tax Map 229 as Lot 62 (the "Foxborough Property").
7. On February 21, 2001, Mr. Furnee submitted a Minimum Impact Expedited Dredge and Fill Application for the fill of wetlands to create an access road through lot 235-3.2 on the Furnee Property to an eight lot subdivision located on subdivided lot 229-58 on the Furnee Property and lot 229-62, the Foxborough Property.
8. On November 30, 2001 DES issued Wetlands and Non-Site Specific Permit No. 2001-00305 (the "Wetlands Permit") to Herbert J. Furnee for the construction of a subdivision road and common driveway to access the subdivided lots on the Foxborough and Furnee Properties. The Wetlands Permit only authorized the fill of 2,630 square ft. of wetland located on lot 235-3.2 of the Furnee Property. No impacts were authorized on the Foxborough Property, or lot 229-58 of the Furnee Property.
9. Project Specific Condition 1 of the Wetlands Permit requires that "all work shall be done in accordance with plans by Turning Point Land Surveyors and Land Planners dated August 10, 2000 (last revised November 14, 2001) as received by the Department on November 19, 2001" (the "Plans"). These plans detail the construction sequence, and the erosion and sediment control measures. Relevant provisions of the Plans include:
 - a) Item 1 in the Construction Sequence (Sheet 13 of the Plans) requires the installation of silt fencing and/or hay bales at existing waterway outflows of the construction area and the maintenance of them during the entire project;
 - b) Item 3 in the Construction Sequence (Sheet 13 of the Plans) requires the construction of temporary and permanent erosion, sediment, and detention facilities before earth moving in the work area; and
 - c) Item 10 in the Construction Sequence (Sheet 13 of the Plans) requires that temporary erosion control measures to remain in place until all disturbed areas have been permanently stabilized by a healthy stand of vegetation or other permanent non-erodable material is in place.
10. Project Specific Condition 4 of the Wetlands Permit requires that "the Permit shall not be effective until it has been recorded with the Registry of Deeds Office by the Permittee. A copy

of the registered permit shall be submitted to the DES Wetlands Bureau.”

11. Project Specific Condition 5 of the Wetlands Permit requires that “appropriate siltation/erosion/turbidity controls shall be in place prior to construction, shall be maintained during construction, and shall remain until the area is stabilized.”

12. Project Specific Condition 6 of the Wetlands Permit requires that “orange construction fencing shall be placed at the limits of construction to prevent accidental encroachment on wetlands or onto abutting Property boundary.”

13. General Condition 1 of the Wetlands Permit required that “a copy of this permit shall be posted on site during construction in a prominent location visible to inspecting personnel.”

14. On June 5, 2002, The Town of Gilford Department of Planning and Land Use (“DPLU”) sent a letter to Mr. Furnee recommending initial remediation measures for wetlands impacts observed by DPLU personnel at the northern end of lot 229-58 of the Furnee Property, adjacent to Belknap Mountain Road. These recommendations were as follows: (a) install erosion control measures; (b) delineate all wetlands on the Furnee Property and Foxborough Property to determine the extent of impacts to jurisdictional areas, and prevent future encroachment into these areas; (c) cease all work in any portion of the delineated wetland; and (d) inform Chuck Rose, the logger, Steve Gothier, the forester, and Al Dolloff, the excavator, to immediately cease work until the location of wetlands on the Property was ascertained.

15. On June 6, 2002, DES received a complaint indicating that excavation activities had extended into wetlands on the Furnee Property located near the northerly edge of lots 229-58.1 and 229-58.2 (subdivided from original lot 229-58 of the Furnee Property), and adjacent to Belknap Mountain Road (the “Furnee Property Logging Area”). Photographs dated May 26, 2002 were attached to the complaint. The photographs showed an excavator working in a seasonally draining stream bordering the logging road located between Lots 229-58.1 and 229-58.2 of the Furnee Property Logging Area. No erosion controls were visible in the photographs and exposed stockpiles of dredge spoils were piled adjacent to the stream.

16. On June 13, 2002, DES personnel inspected the Furnee Property Logging Area, and observed the following:

- a) No silt fencing was installed in existing waterway outflows or along the edge of wetlands;
- b) Exposed soils were not permanently stabilized with a healthy stand of vegetation or other permanent non-erodible material, despite the lack of temporary erosion control measures;
- c) Failure to install erosion controls had caused approximately 45 linear ft. of sediment (fill) to be deposited in the stream (approximately 30 linear ft. of impacts downstream and 15 linear ft. upstream of the culvert running under Belknap Mountain Road);
- d) Approximately 6,000 square feet of stream channel had been recently dredged and

wetland soils dredged from the stream channel were stockpiled in flagged wetlands;

e) Approximately 15,000 sq. ft. of wooded wetland was cleared, stumped and dredged by machinery tracks; and

f) Orange construction fencing had not been installed to prevent accidental encroachment onto wetlands or abutting property.

17. The wetland impacts observed by DES personnel were not authorized by the Wetlands Permit. The Wetlands Permit authorized impacts only on lot 235-3.2 of the Furnee Property.

18. On June 14, 2002, DES personnel received a letter from Attorney Stephan Nix, representing Mr. Furnee. The letter stated that Mr. Furnee had retained a certified wetland scientist to prepare a plan for restoration of impacted wetlands at the Furnee Property Logging Area, installed erosion control measures, and ceased excavation work.

19. On June 17, 2002, DES personnel contacted the Belknap County Registry of Deeds and determined that the Wetlands Permit was not recorded.

20. On June 24, 2002, DES personnel spoke with Attorney Nix and advised him that the subdivision road permitted by the Wetlands Permit would also require a site specific permit. DES personnel explained that phasing of construction in increments of less than 100,000 sq.ft. for a project that will have greater than 100,000 sq. ft. of total impacts does not preclude the requirement to obtain a site specific permit and that the site specific permit must be obtained prior to commencement of construction. On June 25, 2002, DES personnel sent a follow-up letter confirming the telephone conversation.

21. On August 7, 2002, DES Site Specific and Wetlands personnel met with Mr. Furnee. At the meeting, DES personnel emphasized to Mr. Furnee that no work, in exceedence of temporary stabilization, could be carried out on the Furnee or Foxborough Properties without a Site Specific permit. When Mr. Furnee specifically asked whether he could continue the work for road extension or lot development in upland areas while stabilizing the Furnee and Foxborough Properties, DES personnel responded "no." Additionally, DES requested Mr. Furnee to voluntarily refrain from carrying out any additional work in jurisdictional wetland areas, except for installation of appropriate erosion controls, until authorized to proceed by DES. Mr. Furnee was notified at this time that DES has the authority to take enforcement action against anyone who conducts work within its jurisdiction without authorization.

22. On August 15, 2002, DES personnel received a Site Specific permit application for the Access Road. Issuance of a Site Specific permit for the project is pending.

23. On August 19, 2002, DES personnel conducted an inspection in response to a complaint that work was being conducted on the Access Road. During the inspection, DES personnel observed the following:

- a) Work in exceedence of stabilization had commenced on the Access Road without a Site Specific permit. In addition, blasting was taking place at the southerly end of the roadway;
- b) No silt fencing or other temporary erosion controls had been installed to prevent erosion of sediments into wetlands on the Furnee or Foxborough Properties;
- c) Exposed slopes were greater than 3:1 adjacent to the roadway and were not permanently stabilized with a healthy stand of vegetation or other permanent non-erodable material, despite the lack of temporary erosion control measures. No check dams or other erosion control devices were installed along the driveway to prevent channelized flow of sediments into wetland areas located down slope;
- d) Orange construction fencing had not been installed to prevent accidental encroachment onto wetlands or the abutting properties; and
- e) The Wetlands Permit was not posted.

24. During the August 19, 2002 inspection, DES personnel met with Mr. Furnee. Mr. Furnee told DES personnel that he did not realize that phasing of the site was not permitted and that Bryan Bailey, LLS, of Turning Point Land Surveyors, had informed him that phasing in increments of less than 100,000 sq.ft. would preclude the requirement of receiving a site specific permit. Mr. Furnee also informed DES that blasting was not part of the stabilization plan, but that he thought that it could be done as long as stabilization was done also. When DES personnel informed Mr. Furnee that most wetland permits require orange construction fencing and erosion controls such as silt fence to prevent impacts beyond the scope of the permit, Mr. Furnee informed DES personnel that he was not aware of these requirements and that he had not received a wetlands permit for the Access Road. DES personnel advised Mr. Furnee that he should immediately install silt fence, hay bales, and orange construction fence along the edge of all wetlands, that the silt fence must be properly toed in and maintained in the event of rain, that check dams should be installed along the roadway, and that all slopes should be stabilized with seed, mulch and tack netting.

25. On August 29, 2002, DES personnel contacted the Belknap County Registry of Deeds and determined that the Wetlands Permit was not recorded.

26. On August 30, 2002, DES received a letter from Cynthia Balcus, C.W.S. for New Hampshire Soil Consultants ("NHSC"). The letter informed DES that Mr. Furnee had retained the assistance of Attorney Nix, Tom Selling, P.E., Brian Bailey, LLS, and Ms. Balcus to ensure that further construction and permitting requirements would be adhered to. The letter also informed DES on the status of the Property, stating that Mr. Furnee had completed installation of silt fence, hay bales, check dams, and water bars, had graded, seeded and mulched slopes, and stabilized previously installed treatment swales, and was continuing restoration of impacted wetlands, and completing an amended permit application for an additional access road to the lots. Finally, Ms. Balcus' letter was accompanied by an "Emergency Control Procedure Plan."

27. On November 15, 2002, DES received a "Sediment and Erosion Control Report" prepared by NHSC dated November 13, 2002. The report updated DES on the status of the Property and included documentation of the installation of the erosion control measures noted in Paragraph C. 26., above.

28. On December 31, 2002, DES received an inspection report from NHSC from a field inspection conducted by NHSC on December 17, 2002. The inspection report stated that surface areas were found to be frozen and relatively stable and erosion control structures would be maintained throughout the winter.

29. On February 4, 2003, DES received a copy of the Permit recorded at the Belknap County Registry of Deeds at Book 1842, Page 133 on January 31, 2003.

30. On March 6, 2003, DES received a "Herb Furnee/Foxborough Pasture Proposed Restoration Plan" (the "Plan") prepared by NHSC dated November 5, 2002. The Plan proposes wetland restoration for Lots 58.2, 58.3, 58.4 and 62.

31. On March 18, 2003, DES approved the Plan subject to conditions (the "Restoration Plan Approval").

D. DETERMINATION OF VIOLATIONS

1. Herbert J. Furnee has violated RSA 482-A:3, I by failing to comply with Project Specific Condition 1 of the Wetlands Permit which requires that all work shall be done in accordance with plans by Turning Point Land Surveyors and Land Planners dated August 10, 2000 (last revised November 14, 2001) as received by the Department on November 19, 2001. These violations specifically include:

- a) Silt fencing and other temporary erosion control measures were not installed;
- b) Permanent erosion, sediment, and detention facilities were not constructed before earth moving in the work area; and
- c) Disturbed areas were not permanently stabilized by a healthy stand of vegetation or other permanent non-erodable material.

2. Mr. Furnee has violated RSA 482-A:3, I by failing to comply with Project Specific Condition 4 of the Wetlands Permit which requires that the Permit "shall not be effective until it has been recorded with the Registry of Deeds Office by the Permittee. A copy of the registered permit shall be submitted to the DES Wetlands Bureau."

3. Mr. Furnee has violated RSA 482-A:3, I by failing to comply with Project Specific Condition 5 of the Wetlands Permit which requires that appropriate siltation/erosion/ turbidity controls shall be in place prior to construction, shall be maintained during construction, and shall remain until the area is stabilized.

4. Mr. Furnee has violated RSA 482-A:3, I by failing to comply with Project Specific Condition 6 of the Wetlands Permit which requires that orange construction fencing shall be placed at the limits of construction to prevent accidental encroachment on wetlands or onto abutting property boundary.
5. Mr. Furnee has violated RSA 482-A:12 by failing to comply with General Condition 1 of the Wetlands Permit which requires a copy of the issued permit to be posted "in a secured manner in a prominent place at the site of the approved project."
6. Mr. Furnee has violated RSA 482-A:14, III, by filling 45 linear feet of stream channel at the Furnee Property Logging Area.
7. Mr. Furnee has violated RSA 482-A:14, III, by impacting approximately 15,000 sq. ft. of wooded wetlands at the Furnee Property Logging Area.
8. Mr. Furnee has violated RSA 485-A:17 by altering more than 100,000 square feet of terrain on the Furnee and Foxborough Properties without a site specific permit from DES.

E. ORDER

Based on the above findings, DES hereby orders Herbert J. Furnee, and Herbert J. Furnee agrees, to undertake and complete the following actions in accordance with the time schedules specified:

1. Continue to maintain the hay bales, silt fence and any other means of erosion control at the edge of wetlands in accordance with the Sediment and Erosion Control Reports dated November 13, 2002, and December 23, 2002.
2. Carry out the restoration activities as specified in the Restoration Plan Approval letter dated March 18, 2003.
3. **By June 1, 2003**, submit to DES the subdivision plan showing mapped wetlands on the entire subdivision, stamped by a certified wetlands scientist, and recorded in the Belknap Registry of Deeds by June 1, 2003.
4. For rainfall events greater than one-half inch, submit reports of inspections of erosion control measures throughout the remainder of the project biweekly.
5. **By June 1, 2003**, submit to DES an initial restoration monitoring report prepared by a certified wetlands scientist showing, with photos, all impact areas with a narrative describing the current status of the stabilization and the planting success, expressed as a percentage, of hydrophytes planted.
6. **By November 15, 2003**, submit to DES a restoration monitoring report prepared by a certified wetlands scientist showing, with photos, all impact areas with a narrative describing the current status of the stabilization and the planting success, expressed as a percentage, of hydrophytes planted.

7. **By November 15, 2004**, submit to DES a final restoration report prepared by a certified wetlands scientist showing, with photos, all impact areas with a narrative describing the current status of the stabilization and the planting success, expressed as a percentage, of hydrophytes planted.

8. Send correspondence, data, reports, and other submissions made in connection with this Administrative Order by Consent to DES as follows:

Linda Magoon
DES Wetlands Division
6 Hazen Drive
Concord, NH 03301

Voice: (603) 271-2147
Fax: (603) 271-6588
e-mail: lmagoon@des.state.nh.us

F. ADMINISTRATIVE FINES/STIPULATED PENALTIES

1. For the violations noted in the Order, DES hereby assesses administrative fines against Mr. Furnee in the amount of \$7,000. Mr. Furnee shall submit a certified check for \$7,000 made payable to "Treasurer, State of New Hampshire" to DES Legal Unit, 6 Hazen Drive, P.O. Box 95, Concord, NH 03302-0095, no later than thirty (30) days after the effective date of this Administrative Order by Consent.

2. Mr. Furnee agrees to pay a stipulated penalty of \$10,000 for failure to meet any of the requirements outlined in Section E., above. If stipulated penalties become due, payment shall be by certified check made payable to "Treasurer, State of New Hampshire" and mailed to DES Legal Unit, 6 Hazen Drive, P.O. Box 95, Concord, NH 03302-0095, within 15 days of receipt of notice from DES that payment is required.

G. CONSENT AND WAIVER OF APPEAL

1. By execution of this Administrative Order by Consent, Mr. Furnee and Foxborough agree that this Order shall be binding and agrees that this Order may be entered and enforced by a court of competent jurisdiction.

2. By execution of this Administrative Order by Consent, Mr. Furnee and Foxborough waive any right to appeal this Administrative Order by Consent provided by statute, rule, or common law, including without limitation the right to appeal to the Wetlands Council, and waives any right to object to the entry and enforcement of this Order by a court of competent jurisdiction.

3. By execution of this Administrative Order by Consent, Mr. Furnee and Foxborough waive any right to a hearing on or appeal of the administrative fines specified in Section F provided by statute, rule, or common law, and waives any right to object to the fines in any collection action initiated by DES due to non-payment of the fines by Mr. Furnee or Foxborough.

COPY

Herbert J. Furnee

08 MAY 2003

Date

FOXBOROUGH PASTURE, LLC

COPY

By: Herbert J. Furnee
Duly authorized

08 MAY 2003

Date

DEPARTMENT OF ENVIRONMENTAL SERVICES

COPY

Harry T. Stewart, P.E., Director

MAY 21, 2003

Date

COPY

Robert Monaco, Acting Commissioner

5-27-03

Date

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cc: Gretchen Rule, DES Legal Unit
Rene Pelletier, DES Land Resources Management Program
Public Information Officer, DES PIP Office
Mary Ann Tilton, Enforcement, DES Wetlands
Ana Ford, Enforcement, DES Site Specific
Gilford Conservation Commission
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